

119 FERC ¶ 61,109  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Jon Wellingshoff.

DTE Energy Trading, Inc.

Docket No. EL05-63-003

v.

Midwest Independent Transmission System  
Operator, Inc.

ORDER DENYING REHEARING

(Issued May 2, 2007)

1. In this order, we address Midwest Stand-Alone Transmission Companies' (MSATs)<sup>1</sup> and the Midwest ISO Transmission Owners' (Midwest ISO TOs)<sup>2</sup> requests for

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<sup>1</sup> For purposes of this filing, the MSATs include American Transmission Company LLC (ATCLLC), International Transmission Company (International Transmission), and Michigan Electric Transmission Company, LLC (METC).

<sup>2</sup> The Midwest ISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Co. d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP; Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliate Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Great River Energy; Hoosier Energy Rural Electric

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rehearing of the Commission's order in *DTE Energy Trading, Inc. v. Midwest Independent Transmission System Operator, Inc.*<sup>3</sup> As discussed below we will deny the requests for rehearing.

**I. Background**

**A. Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Tariff**

2. Under section 22.1 of the Midwest ISO open access transmission and energy markets tariff (TEMT or tariff),<sup>4</sup> a firm point-to-point transmission service customer may request to redirect its scheduled transmission service on a non-firm basis over Receipt and delivery points (or source and sink points) other than those originally reserved without incurring additional non-firm point-to-point transmission service charges, except

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Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; LG&E Energy LLC (for Louisville Gas and Electric Company and Kentucky Utilities Company); Lincoln Electric System; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northwestern Wisconsin Electric Company; Otter Tail Corporation d/b/a Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); and Wabash Valley Power Association, Inc.

<sup>3</sup> 113 FERC ¶ 61,214 (2005) (*November 29 Order*). The *November 29 Order* denied Midwest ISO's motion for stay, denied requests for rehearing, and granted requests for clarification of the Commission order in *DTE Energy Trading, Inc. v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,062 (2005) (*April 18 Order*).

<sup>4</sup> The TEMT provides for terms and conditions necessary to implement a market-based congestion management program and energy spot markets. This includes a day-ahead energy market and a real-time energy market, locational marginal pricing, and a market for financial transmission rights. When Midwest ISO commenced operation of financially binding energy markets on April 1, 2005, it also began providing transmission service under the TEMT instead of the Midwest ISO open access transmission tariff. See *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163, *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043 (2005).

as provided in section 22.1a (which subsequently became section 22.2), subject to certain conditions.<sup>5</sup> If the customer requested to redirect service over a transmission path with a higher cost than the path the customer reserved, section 22.2 of the Midwest ISO TEMT provided that the customer shall pay “the additional costs (*i.e.*, the difference in the zonal rates) associated with the new path.”<sup>6</sup>

### **B. DTE Energy Trading, Inc.’s (DTE Energy) Complaint**

3. DTE Energy filed a complaint asserting that Midwest ISO improperly charged the hourly rate for non-firm point-to-point transmission service when DTE Energy elected to modify the receipt point of its primary firm transmission service reservation pursuant to section 22.1 of the Midwest ISO TEMT. Consequently, DTE Energy argued that Midwest ISO violated its tariff as well as the filed rate doctrine when it applied the hourly non-firm rate to non-firm redirect service that had a delivery point in the same pricing zone as its primary firm transmission reservation as well as outside this zone.<sup>7</sup>

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<sup>5</sup> The conditions in section 22.1 provide that redirected service is non-firm only and does not displace any firm or non-firm service already scheduled, that the total amount of firm and non-firm service provided to the redirecting customer shall not exceed the amount reserved in the initial Service Agreement, and that the non-firm service is subject to the requirements of Section II of the OATT, except as to transmission rates.

<sup>6</sup> In Docket No. ER05-273-000, the Commission accepted, suspended, made subject to refund, and established hearing and settlement judge procedures, a revised section 22.2. This order will refer to the language in section 22.2 that was effective during the time period covered by the complaint in this case as “former” section 22.2. *See Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,081, *order on reh’g* 111 FERC ¶ 61,462 (2005), *order denying tariff revisions*, 118 FERC ¶ 61,095 (2007) (*MISO TEMT Order*).

<sup>7</sup> The City of Holland, Michigan (Holland) also filed a complaint seeking similar relief with regards to non-firm redirect service that had a delivery point in the same pricing zone as its primary firm transmission reservation asserting that Midwest ISO violated the former section 22.2 of its TEMT (Docket No. EL05-55-000). The Commission granted that complaint in an order issued concurrently with the April 18 Order. *See City of Holland, Michigan v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,076, *order on reh’g and clarification*, 112 FERC ¶ 61,105 (2005) (*Holland*).

### **C. April 18 Order**

4. In the *April 18 Order* the Commission found, among other things, that Midwest ISO violated the former section 22.2 of its TEMT by assessing the higher hourly non-firm rate to non-firm redirect service taken by DTE Energy under the tariff in the same transmission pricing zone.<sup>8</sup> The Commission noted that former section 22.2 “‘unequivocally’ provided that the Transmission Customer shall pay in addition to the amounts based on its initial reservation the additional costs (*i.e., the difference between the zonal rates*) associated with the new path.”<sup>9</sup> Accordingly, the Commission concluded that a firm transmission service customer who redirected its service to secondary receipt and delivery points within the same pricing zone as originally reserved should not incur additional charges, because former section 22.2 stated that any additional costs would be the “difference between the zonal rates.”<sup>10</sup> As a result, the Commission directed Midwest ISO to refund to each customer improperly charged under the former section 22.2 the difference between the non-firm hourly rate assessed for redirect service within the same pricing zone and the original firm transmission service rate contained in the customer’s primary reservation, plus interest.<sup>11</sup>

### **D. November 29 Order**

5. In the *November 29 Order*, the Commission denied Midwest ISO’s request for rehearing and granted DTE Energy’s and Constellation Energy Commodities Group, Inc.’s requests for clarification of the *April 18 Order*. The Commission explained that: (1) Midwest ISO’s TEMT rates for redirected transactions are based on the rates for the designated sink point; (2) the rate for redirected transactions does not change if the sink point remains the same; and (3) the former section 22.2 makes an additional charge applicable when the redirected transaction sinks into a higher rate zone. Accordingly, the Commission concluded that any additional charge can only be the difference between the relevant zonal rates and not the “higher of” non-firm hourly rate charged by Midwest

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<sup>8</sup> April 18 Order at P 25.

<sup>9</sup> *Id.* (emphasis original).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at P 28.

ISO.<sup>12</sup> The Commission also stated that any additional charge must be pro-rated to reflect the duration of the redirected transaction.

The Commission clarified that DTE Energy is entitled to refunds equal to the difference between Midwest ISO's hourly non-firm rate and the charges properly due under the former section 22 for all service redirected to higher-pricing zones since 2002 (with interest).<sup>13</sup>

## **E. Requests for Rehearing**

### **1. MSATs' Rehearing Request**

6. MSATs argue that the Commission's finding that customers are entitled to refunds for pricing relating to inter-zonal redirects and refunds relating to tariff violations involving Midwest ISO's pricing of intra-zonal redirects was in error. MSATs argue that the Commission did not make the requisite finding that Midwest ISO's pricing of inter-zonal redirects violated its tariff.

7. MSATs go on to argue that Midwest ISO's practice of charging non-firm hourly rates for inter-zonal redirects did not violate the tariff. According to MSATs, despite the ambiguity of the non-firm redirect pricing provisions, Midwest ISO's interpretation and application of the provisions to inter-zonal redirects was reasonable, non-discriminatory, and consistent with Commission policy.

8. Finally MSATs assert that balancing the relevant equities in this case weighs heavily against retroactive refunds. They argue that any misinterpretation of the tariff provisions was inadvertent and largely ministerial in nature, did not produce unjust or unreasonable rates, and did not lead to unjust enrichment on the part of Midwest ISO or any of its transmission-owning members. Under these circumstances, MSATs contend that there is no justification for ordering retroactive refunds and doing so would be inconsistent with Commission policy disfavoring the implementation of rate design changes on a retroactive basis.<sup>14</sup>

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<sup>12</sup> See November 29 Order at P 9.

<sup>13</sup> *Id.* at P 10. Because the request for rehearing and stay was identical to the request for rehearing and stay in Docket No. EL05-55-000, the Commission denied

Midwest ISO's request for rehearing and stay for the reasons discussed in *Holland*. *Id.* at P 11.

<sup>14</sup> MSATs Rehearing Request at 11-13, 14 n. 35.

## 2. Midwest ISO TOs' Rehearing Request

9. Midwest ISO TOs echo MSATs' arguments that the Commission erred when it clarified the *April 18 Order* to provide that DTE Energy is entitled to refunds not only for intra-zonal redirects but for all non-firm redirects, including those to higher priced zones (inter-zonal redirects). They assert that the Commission failed to analyze the relevant tariff provisions and that any such analysis would have shown that Midwest ISO's interpretation was reasonable.

10. Midwest ISO TOs argue that the *November 29 Order* is inconsistent with *New York Independent System Operator Inc.*,<sup>15</sup> where retroactive refunds were not ordered because the violation was by an independent transmission provider, and there was no financial windfall. They also argue that the Commission's refund order is inconsistent with *Occidental Chemical Corp. v. PJM Interconnection, L.L.C.*,<sup>16</sup> where the Commission did not order refunds because that would adversely affect the collection of revenue requirements from blameless transmission owners.

11. Midwest ISO TOs disagree with the Commission's ruling in the *November 29 Order*. They argue that directing retroactive refunds violates section 206 of the Federal Power Act (FPA)<sup>17</sup> which provides for prospective relief after a complaint. They further argue that section 206 does not provide for remedies against entities that were not the subject of the complaint or found to have violated a tariff or order. Finally, they assert that retroactive relief disrupts the structure of section 206, which provides notice of a problem with a rate and provides relief only after the notice; in contrast, the *November 29 Order* could allow a party to reflect revenues in earnings and face a refund obligation some five or ten years later. According to Midwest ISO TOs, the new penalty provisions in section 316A of the FPA<sup>18</sup> reflect Congressional intent that the appropriate way to impose remedies for past tariff violations after enactment of the Act is through penalties under section 316A, not under section 206.

12. In addition to the statutory argument against the retroactive refunds, Midwest ISO TOs argue that the Commission's decision to require refunds dating back to 2002 for a

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<sup>15</sup> 110 FERC ¶ 61,244 (2005) (*NYISO*).

<sup>16</sup> 110 FERC ¶ 61,378 (2005) (*Occidental*).

<sup>17</sup> 16 U. S. C. § 824e (2000).

<sup>18</sup> See *Energy Policy Act of 2005*, P. L. No 109-58, 119 Stat. 594 (2005).

complaint filed in 2005 is inequitable under the doctrine of laches. According to Midwest ISO TOs, parties that sit on their rights may be barred from damages for past periods. They point out that Midwest ISO's redirect pricing policy was transparent and well known for years before any complaint was filed, thus the complainants should not be rewarded for dilatory behavior in filing.

13. Finally, Midwest ISO TOs request clarification as to whether refunds directed in the *November 29 Order*, apply to all entities or only the complainants.

14. Constellation Energy Commodities Group, Inc. (Constellation Energy) and DTE Energy each filed answers to Midwest ISO TOs' and MSATs' requests for rehearing. Midwest ISO TOs filed responses to DTE Energy's and Constellation Energy's answers. Midwest ISO filed a response to DTE Energy's answer.

## II. Discussion

15. As explained below, we deny MSAT's and Midwest ISO TOs' rehearing requests.

### A. Procedural Matter

16. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to rehearing requests. Accordingly, we will reject the answers.

### B. Substantive Matters

#### 1. Inter-zonal Rates

17. We disagree with MSATs' assertion that the record does not support DTE Energy's claim that Midwest ISO's pricing of inter-zonal redirects violated the tariff. The Commission decided in the *April 18 Order* that section 22.2 of the Midwest ISO OATT, on file with the Commission at the time Midwest ISO charged DTE Energy the "higher of" non-firm hourly rate, unequivocally provided that "the Transmission Customer shall pay in addition to the amounts based on its initial reservation the additional costs (*i.e., the difference between the zonal rates*) associated with the new path." (emphasis added) The Commission was not persuaded by Midwest ISO's assertion that its approval of "higher of" pricing policies for non-firm redirect service in other cases justified the "higher of" pricing employed by Midwest ISO. As the Commission explained, if Midwest ISO wanted to charge "higher of" pricing it "could have done so when it proposed the initial section 22.2 or could have made a filing proposing to do so at

any time.”<sup>19</sup> The Commission further pointed out that while the TEMT authorizes Midwest ISO to charge higher rates for non-firm transmission service, non-firm redirect service is distinct from that non-firm service.

18. We also disagree with MSATs’ assertion that Midwest ISO’s interpretation and application of the “higher of” rate to inter-zonal redirects was a reasonable interpretation of the TEMT. In Docket No. ER05-273-000, Midwest ISO implied that its interpretation of section 22.2, which was challenged in DTE Energy’s complaint, was reasonable. Midwest ISO argued in that proceeding that the proposed section 22.2 memorializing the instant contested interpretation should be accepted because it “seeks nothing more than to confirm that the *Appalachian* rate design principles that already apply in the Midwest ISO are applicable to the pricing of non-firm redirect service and that ‘the higher value of the on-peak hourly service is recognized as part of the zonal rate difference for purposes of non-firm redirect pricing.’” The Commission rejected this interpretation stating:

Order No. 888 [established] the right of redirect on a non-firm basis as an integral feature of firm point-to-point transmission service. The Commission explicitly allowed non-firm redirects at no additional charge, fully aware of the *Appalachian* [*Appalachian Power Company*, 39 FERC ¶ 61,296 (1987)] pricing method, which had been adopted nearly 10 years earlier. (footnote omitted). The Commission did not apply the *Appalachian* method to non-firm redirect service, as it strove to balance the pluses and minuses between network service and point-to-point transmission service. Neither Midwest ISO nor Transmission Owners have provided a reasonable justification for changing the approach taken by the Commission in Order No. 888.<sup>20</sup>

The *MISO TEMT Order* rejected the proposed revisions to section 22.2 of the TEMT, filed by Midwest ISO to explain the interpretation of its rate authority that it had been applying to redirect service since the TEMT became effective.<sup>21</sup> The Commission

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<sup>19</sup> April 18 Order at P 26

<sup>20</sup> *MISO TEMT Order*, 118 FERC ¶ 61,095 at P 83.

<sup>21</sup> In its November 30, 2004 filing, Midwest ISO stated that its practice had been to charge redirecting customers the “higher of” cost of its initial firm point-to-point service or the new non-firm point-to-point service it would receive, to prevent firm customers from “gaming” the transmission service reservation system by redirecting their firm reservations to acquire

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determined in the *MISO TEMT Order* that the proposed revisions were not consistent with or superior to the Order No. 888 *pro forma* tariff.<sup>22</sup> The Commission also determined that Midwest ISO's proposal had not shown why Order No. 888 should not apply to its TEMT.<sup>23</sup> The Commission pointed out that Order No. 888 specifically envisioned ISOs that would offer regional service and the Commission has consistently required ISO OATTs to meet the requirements of Order No. 888 and to demonstrate that deviations from Order No. 888 meet the standards required under Order No. 888.<sup>24</sup> Accordingly, the Commission rejected, as inconsistent with Order Nos. 888 and 888-A, the proposed revisions to section 22.2 that memorialize Midwest ISO's challenged interpretation of section 22.2 here. Therefore, we find that Midwest ISO's interpretation was not reasonable and is inconsistent with Order Nos. 888 and 888-A.

## 2. Refunds

19. Midwest ISO TOs' reliance on *NYISO* to support their claim that under similar circumstances the Commission did not exercise its authority to order retroactive refunds is misplaced. In that case the tariff violation involved was a technical violation which the

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non-firm transmission service at discounted rates. However, Midwest ISO stated that some transmission customers expressed confusion as to the authority to charge this "higher of" rate. To resolve any ambiguity, Midwest ISO proposed to revise the then-existing language in section 22.2 of its OATT, and to add a new subsection (a), to clarify that a redirecting transmission customer will be liable for the additional costs associated with redirecting. *MISO TEMT Order*, 111 FERC ¶ 61,462 at P 3.

<sup>22</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

<sup>23</sup> See *MISO TEMT Order*, 118 FERC ¶ 61,095 at P 79.

<sup>24</sup> See Order No. 888 at 31,730-32; see also *Atlantic City Electric Company*, 77 FERC ¶ 61,148 (1996). See *MISO TEMT Order* at P 82 n. 30.

Commission determined “did not provide an improper windfall, because it was the proper and appropriate pricing method that provided efficient prices....”<sup>25</sup> In that case, the Commission looked to other cases where the tariff violations were inadvertent, or due to ambiguous provisions and the utility did not gain a windfall from the violation.<sup>26</sup> In this case, however, the violation is not technical. Rather it violates Midwest ISO’s filed rate and, as explained above, the provisions are clear. Likewise Midwest ISO TOs’ reliance on *Occidental* is misplaced. In that case the Commission, on remand, decided not to order retroactive refunds because the Commission had found that part of the formula for allocating PJM’s network access charge cost coincident with annual peak zone was reasonable. Nonetheless, the Commission found that PJM’s practice of adding back curtailed load to its calculation appeared inconsistent with the underlying rationale of reducing a customer’s costs when it reduces load during system peaks.<sup>27</sup> Consequently on remand the Commission decided:

We also agree that the retroactive application of our order, back to the refund effective date, did not permit the transmission owners from altering their decisions made in reliance on the previously accepted rate design and did not give PJM’s transmission owners an opportunity to file, under Section 205, to change their rate designs to reflect the elimination of curtailed load. (footnote omitted) Accordingly, the rate design changes required by the March 12 Order should be applied on a prospective basis, i.e., effective as of the date of our order, March 12, 2003. We will direct PJM to determine refunds and surcharges to comply with this order, based on a prospective application of the rate design change required in the Commission’s March 12 Order.<sup>28</sup>

In the instant case the Commission never approved Midwest ISO’s interpretation.

20. Moreover, Midwest ISO TOs and MSATs were parties to and participated in the *Holland* case. In that case the Commission ordered Midwest ISO to pay retroactive refunds for intra-zonal redirects plus interest. Midwest ISO, on rehearing argued that “the Commission has no obligation . . . to order refunds for every departure from the filed

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<sup>25</sup> *NYISO* at P 65.

<sup>26</sup> *Id.* at P 64.

<sup>27</sup> *See Occidental*, 102 FERC ¶ 61,275 at P4.

<sup>28</sup> 110 FERC ¶ 61,378 at P 12.

rate.”<sup>29</sup> The Commission denied Midwest ISO’s request for rehearing of this issue finding that the difficulties that Midwest ISO may face in making the refunds are “outweighed by the need to ensure that public utilities charge their customers the filed rate.”<sup>30</sup>

21. Finally, we clarify that the refunds ordered in the *November 29 Order* and *April 18 Order* are applicable to all customers who have been assessed the higher non-firm rate for redirect service under the former section 22.2.

The Commission orders:

The rehearing requests are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>29</sup> *Holland*, 112 FERC ¶ 61,105 at P 8.

<sup>30</sup> *Id.* at P 11.